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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

VINCENT MORALES,

Defendant and Appellant.

D073578

(Super. Ct. No. SCE358881)

APPEAL from a judgment of the Superior Court of San Diego County, Patricia K. Cookson, Judge. Affirmed.

Jill M. Klein, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Robin Urbanski and Kristen Kinnaird Chenelia, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Vincent Morales of fifteen counts of lewd acts on a child under the age of 14 (Pen. Code, § 288,¹ subd. (a); counts 1-14, 16), one count of a forcible lewd act upon a child under the age of 14 (§ 288, subd. (b)(1); count 15), two counts of unlawful sexual intercourse with a minor (§ 261.5, subd. (c); counts 17, 18), and four counts of oral copulation of a person under the age of 18 (§ 288a, subd. (b)(1); counts 19-22). As to counts 4 through 7, 11, and 13 through 15, the jury found true allegations of Morales's substantial sexual conduct (§ 1203.066, subd. (a)(8)). After a bifurcated trial, the trial court found true that as to counts 1 through 16, there was more than one victim. (§ 667.61, subs. (a), (c), (d).) The court sentenced Morales to an indeterminate term of 60 years to life in state prison plus an aggregate determinate term of 4 years 4 months.²

On appeal, Morales contends the trial court prejudicially erred by discharging a juror, Juror No. 9, without good cause. He argues that because the record does not establish that Juror No. 9 could not follow the law or was otherwise unable to perform her duties as a juror, her dismissal was an abuse of discretion. We affirm the judgment because Juror No. 9's unwillingness and inability to perform her duties appears in the record as a demonstrable reality, and thus the court did not abuse its discretion by dismissing her.

¹ Undesignated statutory references are to the Penal Code.

² Specifically, the court imposed consecutive 15-year-to-life terms on counts 1, 8, 15 and 16, and concurrent 15-year-to-life terms on counts 2 to 7 and 9 to 14. The determinate term of 4 years 4 months on counts 17 to 22 consists of the three-year upper term on count 17 (the principal count), concurrent three-year upper terms on counts 18, 20 and 22, and consecutive eight-month terms (one-third the midterm) on counts 19 and 21.

FACTUAL AND PROCEDURAL BACKGROUND

Prosecutors charged Morales with committing various sex offenses against three minor girls between 2005 and 2013. Two of the victims were his daughter's friends who encountered Morales while over for playdates and sleepovers. The third victim was a younger friend of a woman Morales helped care for.

The case was tried to the jury over three days. The jury began deliberations on a Friday afternoon and about an hour and a half later informed the bailiff it had reached verdicts. The parties agreed the court would read the verdicts the following Monday morning. On Monday morning, the court informed the parties it just learned from the bailiff that Juror No. 9 had a question and that it had asked the juror to memorialize it. The court read her note, jury note No. 1, which stated: "I do not feel I have given Mr. Morales a fair trial yet. I want to know if I will have the opportunity to bring this up before verdict [*sic*] is read?" The court asked each juror if further deliberations were needed. Each juror answered no, except Juror No. 9, who said yes. As a result, the court declined to take the verdicts and instructed the jury to continue its deliberations. The court then received two additional notes from the jury's foreperson, Juror No. 6.³ Jury note No. 3 requested that the court re-explain various instructions, specifically CALCRIM No. 220 "in relation to" CALCRIM No. 1191B, as "[Juror No.] 9 believes they cannot be related, i.e., defendant inclined is [*sic*] not a good enough cause," and CALCRIM No. 1190, stating, "[Juror No.] 9 believes . . . [law enforcement officers]

³ Jury note No. 2 stated that Juror No. 9 asked to hear and read the testimony of a detective and one victim.

should have sent witnesses back in with video gear 'like the police did with all of those Swedish kids.'"⁴ (Some capitalization omitted.) That same note asked the court to define the difference between "collaboration" and "correlation" because Juror No. 9 "believes one means the other." The court offered to re-read CALCRIM Nos. 220 and 1191B, and told the jury that CALCRIM No. 1190 was self-explanatory. It read dictionary definitions for the referenced words as well as the word "corroborate."

Later that afternoon, the court received three additional notes (jury notes Nos. 4, 5, and 6). Jury note No. 4, from Juror No. 9, asked, "Is 'CALCRIM No. 301'⁵ the law? Can I be excused?" Jury note No. 5, from the foreperson, stated that after reading the court's response to jury note No. 3, Juror No. 9 believed CALCRIM No. 1190 was "invalid" and "does not want to participate in any further jury discussion until 1190 is proven to her not to be a 'typo.'" (Some capitalization omitted.) That note continued that Juror No. 9 "does not believe a conviction can be based on testimony alone," and that other jurors had expressed concern about Juror No. 9's "antagonistic responses" and "extremely short term

⁴ CALCRIM No. 220, entitled "Reasonable Doubt," explains the general burden of proof for considering whether evidence proves guilt beyond a reasonable doubt. CALCRIM No. 1190, entitled "Other Evidence Not Required to Support Testimony in Sex Offense Case," states: "Conviction of a sexual assault crime may be based on the testimony of a complaining witness alone." CALCRIM No. 1191B, entitled "Evidence of Charged Sex Offense," instructs the jury that if the People prove beyond a reasonable doubt the defendant committed one or more of the charged crimes, the jury is permitted to conclude from the evidence that the defendant was disposed or inclined to commit sexual offenses, and also that the defendant was likely to commit and did commit the other charged sex offenses.

⁵ CALCRIM No. 301, entitled "Single Witness's Testimony," states: "The testimony of only one witness can prove any fact. Before you conclude that the testimony of one witness proves a fact, you should carefully review all the evidence."

memory issues." Jury note No. 6, from Juror No. 11, stated that Juror No. 9 seemed to have a "significant mental deficit" and "doesn't seem to understand basic concepts." That note also stated Juror No. 9 "keeps getting angry at us," "gets hung up on strange things," "disagrees with CALCRIM [No.] 1190 and says she couldn't follow it," "she has reversed herself over and over," "read each jury instruction a dozen times [and] it is as if she's hearing it again for the first time each time one of us says anything about it."

Outside the presence of the jury, the court expressed concern over Juror No. 9's question about CALCRIM No. 301. It indicated it would find out if Juror No. 9 was willing to follow the law and learn more about her desire to be excused. The court noted its intention to excuse Juror No. 9 if she indicated she was not willing to follow the law and its preference to not yet delve into her mental acuity. It brought the jury into the courtroom, and addressing Juror No. 9's question, confirmed that CALCRIM No. 301 was the law. The following exchange then occurred:

"The Court: Can you follow that law?

"(Pause in the proceedings.)

"Juror No. 9: Would you read the law again, please.

"The Court: Yes . . . [Court re-reads CALCRIM No. 301.]

"(Pause in the proceedings.)

"Juror No. 9: Yes, I can follow that.

"The Court: Okay. Now, you took a long time to respond. I haven't even gotten to the other jurors' notes. Now you're asking can you be excused, and my answer is, it depends. My concern is that another juror has written a note indicating you may have

some difficulty following the law as it applies to CALCRIM [No.] 1190. Do you want me to read [CALCRIM No.] 1190?

"Juror No. 9: Yes, please.

"The Court: Conviction of a sexual assault crime may be based on the testimony of a complaining witness alone.

"Juror No. 9: And your question is can I follow that law?

"The Court: Yes.

"Juror No. 9: One witness?

"The Court: One witness.

"Juror No. 9: One act?

"The Court: One witness.

"Juror No. 9: One witness. Would you read it one more time, please?"

The court re-read CALCRIM No. 1190 and Juror No. 9 responded, "Okay. I can do that." The court and Juror No. 9 had the following exchange:

"The Court: Okay. Do you still want to be excused?

"(Pause in the proceedings.)

"The Court: You're taking a long time to answer.

"Juror No. 9: I know. I probably should be—

"The Court: And why is that?

"Juror No. 9: —excused.

"The Court: Excused?

"Juror No. 9: I should be excused.

"The Court: And why is that?

[¶] . . . [¶] . . .

"Juror No. 9: Umm . . . maybe I'm not smart enough but I don't understand that law."

The court re-read CALCRIM No. 1190 to Juror No. 9 and again emphasized it wanted to find out if she could follow the law, stating, "If you can't, you can't. If you can, you can." The court and Juror No. 9 had the following exchange:

"The Court: You're shaking your head no.

"Juror No. 9: I can't follow the law.

"The Court: You can't follow the law?

"Juror No. 9: If that's the law.

"The Court: That's the law.

"Juror No. 9: One thing?

"The Court: One complaining witness.

"Juror No. 9: One complaining witness.

"The Court: Yes.

"(Pause in the proceedings.)

"Juror No. 9: Yes, I could follow the law if there was enough evidence.

"The Court: Well, that's—that's not what I'm asking you. I'm asking you if you can follow the law as it related to CALCRIM [No.] 1190 Can you follow that law—

"Juror No. 9: Yes.

"The Court: —because you've told me 'yes,' 'no,' and now you're saying—

"Juror No. 9: Yes, I can.

"The Court: Now you're saying you can?

"Juror No. 9: Yes.

"The Court: Okay. Well, I feel that I need to explore the other juror notes."

The court addressed jury note No. 5 with the foreperson: "[Y]ou've written the Court indicating that a juror has expressed opinions about [CALCRIM No.] 1190 and that there are some problems with following the law in [CALCRIM No.] 1190. [¶] . . . [¶] And this particular juror has expressed that that juror will not follow the law as to [CALCRIM No.] 1190." The foreperson responded: "We've gone back and forth all day on it, whether it was an issue with the law or whether it was an issue with forming a reasonable doubt." The court reminded the foreperson it was only concerned about "whether or not a juror can follow the law" and asked if the foreperson thought there were problems with a juror being unable or unwilling to follow the law. The foreperson answered affirmatively. The court then polled the other jurors:

"The Court: I'm going to ask Juror No. 1, do you feel that there's a juror in the present composition of this jury who is unwilling to follow the law?

"Juror No. 1: Yes.

"The Court: Juror No. 2?

"Juror No. 2: Yes.

"The Court: Juror No. 3?

"Juror No. 3: Yes.

"The Court: Juror No. 4?

"Juror No. 4: Yes.

"The Court: Juror No. 5?

"Juror No. 5: Yes.

"The Court: [Juror No.] 6 has already said yes. Juror No. 7?

"Juror No. 7: Yes.

"The Court: Juror No. 8?

"Juror No. 8: Yes.

"The Court: Juror No. 9, are you willing to follow the law?

"(Pause in the proceedings.)

"The Court: You're hesitating a third time.

"Juror No. 9: I didn't hear your first two words. 'Are you willing to follow the law' you said?

"The Court: Yes.

"Juror No. 9: Yes.

"The Court: Juror No. 10?

"Juror No. 10: Yes.

"The Court: Juror No. 11?

"Juror No. 11: Yes.

"The Court: And Juror No. 12?

"Juror No. 12: Yes."

The court excused Juror No. 9 "[b]ased upon the jury's responses." Outside the jury's presence, the court re-read the jury notes concerning Juror No. 9. It stated its

inquiry of Juror No. 9 caused it to be concerned about whether she was willing to follow the law, observing she took about 30 to 40 seconds to respond, and it was not sure if she misunderstood the question or if she was "delving over her response." Morales's counsel argued the court possibly prematurely dismissed Juror No. 9, referencing the foreperson's earlier comment about " 'an issue of following the law and whether there is reasonable doubt.' " He posited that perhaps Juror No. 9 felt there was reasonable doubt and pointed out she said she could follow the law. The trial court responded, "And then she said she couldn't, then she asked to be excused. You know, in a perfect world I would agree with you . . . but it appeared that something cognitively was going on with Juror No. 9 that seemed really out of sorts." It further noted it did not think Juror No. 9 "understood the Court's questions, and . . . I didn't want to ask her personal questions about whether or not she was on any type of medication, but something was amiss." The prosecutor pointed out that when Juror No. 9 stated she could follow the law, the other jurors "either sighed or shook their head as if to indicate that that was not what was happening back in their deliberations." The court stated, "Well, I noticed that also. A couple of the jurors shook their head in disbelief like they were hearing it for the first time." The court concluded, "I excused Juror No. 9 based upon her jury note to the Court and her inability to track the Court's questions. I feel that she could not and has not followed the law."

An alternate juror was seated. After the court gave instructions, the jury resumed deliberations and concluded them that morning, returning guilty verdicts on all 22 counts, with true findings on the section 1203.066, subdivision (a)(8) allegations attached to counts 4, 5, 6, 11, 13, 14 and 15.

DISCUSSION

Morales contends the court prejudicially erred by discharging Juror No. 9 because the record does not manifestly show she could not follow the law, but rather she performed her duties and merely questioned the sufficiency of the People's evidence such that no good cause existed for her discharge. He argues that although Juror No. 9 initially asked to be excused, further questioning confirmed she was willing and able to follow the law as she said "at least six times that she could follow the law." According to Morales, these circumstances are distinguishable from those warranting a juror's dismissal in *People v. Williams* (2001) 25 Cal.4th 441 (*Williams*), and are more akin to the facts in *People v. Cleveland* (2001) 25 Cal.4th 466 (*Cleveland*) in which the court erred by discharging a juror. Specifically, he asserts: Juror No. 9 participated in deliberations; the jury notes demonstrated only Juror No. 9's disagreement with her fellow jurors; only two jurors expressed doubts in Juror No. 9's ability to follow the law and the court did not expressly ask the jurors whether Juror No. 9 refused to apply the law to the facts or failed to follow the law; Juror No. 9's pauses before responding to the court do not support the court's finding that she could not follow the law; and Juror No. 9 was merely frustrated with the evidence and viewed it differently than the other jurors. Morales argues reversal is required because Juror No. 9's discharge violated his rights under the Sixth and Fourteenth Amendments to the United States Constitution to trial by a fair and unbiased jury as well as a unanimous jury verdict.

A. *Legal Standards*

Section 1089, which governs the trial court's dismissal of a juror, states in part: "If at any time, whether before or after final submission of the case to the jury, a juror . . . upon . . . other good cause shown to the court is unable to perform [her] duty, or if a juror requests a discharge and good cause appears therefor, the court may order the juror to be discharged and draw the name of an alternate."

"Removing a juror is, of course, a serious matter While a trial court has broad discretion to remove a juror for cause, it should exercise that discretion with great care." (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1042 (*Barnwell*)). An appellate court's "review of the decision to remove a seated juror is not conducted under the typical abuse of discretion standard, but rather under the 'demonstrable reality' test." (*People v. Fuiava* (2012) 53 Cal.4th 622, 711 (*Fuiava*); see also *People v. Armstrong* (2016) 1 Cal.5th 432, 453-454.) Our Supreme Court explained in *Fuiava*: "The typical abuse of discretion standard involves an analysis of whether the trial court's decision is supported by 'substantial evidence,' and 'has been characterized as a 'deferential' standard." (*Fuiava*, at p. 711.) "Even when there is a significant amount of countervailing evidence, the testimony of a single witness that satisfies the standard is sufficient to uphold the finding." (*Ibid.*) In contrast, "[t]he demonstrable reality test entails a more comprehensive and less deferential review. It requires a showing that the court as a trier of fact *did* rely on evidence that, in light of the entire record, supports its conclusion that [good cause for removing the juror] was established." (*Id.* at p. 712.) Under the demonstrable reality standard, reviewing courts "must be confident that the trial court's conclusion is manifestly supported by evidence on which the court actually relied."

(*Barnwell*, 41 Cal.4th at p. 1053.) In reaching that conclusion, this court considers "not just the evidence itself, but also the record of reasons the court provides." (*Ibid.*) The "heightened" and "more stringent" demonstrable reality standard "more fully reflects an appellate court's obligation to protect a defendant's fundamental rights to due process and to a fair trial by an unbiased jury." (*Id.* at p. 1052; see also *People v. Allen and Johnson* (2011) 53 Cal.4th 60, 71.)

In *Fuiava*, the Supreme Court made clear in this context that reviewing courts are not permitted to reweigh the evidence: "As we have consistently cautioned, however, even under the demonstrable reality standard the reviewing court does *not* reweigh the persuasive value of the evidence." (*Fuiava, supra*, 53 Cal.4th at p. 714, italics added.) "[E]ven when there is conflicting evidence . . . an appellate court must recognize that it is for the trial court to 'weigh the credibility of those testifying and draw upon its own observations of the jurors throughout the proceedings,' and the reviewing court must 'defer to factual determinations based on these assessments.'" (*Ibid.*) Accordingly, reviewing courts must defer to the trial court's assessments of a juror's credibility or mental and physical conditions, "based 'on firsthand observations unavailable to us on appeal.'" (*People v. Powell* (2018) 6 Cal.5th 136, 156 [mental and physical conditions]; *Barnwell, supra*, 41 Cal.4th at p. 1053 [credibility].)

B. *Williams and Cleveland*

Our assessment of Morales's claims is assisted by a review of *Williams, supra*, 25 Cal.4th 441, and *Cleveland, supra*, 25 Cal.4th 466. In *Williams*, the Supreme Court held a court properly discharged a juror who refused to follow the law because the juror's

inability to perform his duties appeared in the record as a demonstrable reality.

(*Williams*, at p. 461.) During deliberations, "[t]he juror stated that he objected to the [relevant] law . . . and expressly confirmed that he was unwilling to abide by his oath to follow the court's instructions." (*Ibid.*) The juror explained, "I'm trying as best I can, Judge. And I'm willing to follow all the rules and regulations on the entire rest of the charges, but on that particular charge, I just feel duty-bound to object." (*Id.* at p. 447.) The trial court stated, " 'So you're not willing then to follow your oath?,' to which the juror answered: 'That is correct.' " (*Id.* at p. 461.)

Williams held that "[a] juror who refuses to follow the court's instructions is 'unable to perform his duty' within the meaning of . . . section 1089. As soon as a jury is selected, each juror must agree to render a true verdict ' "according only to the evidence presented . . . and to the instructions of the court." ' " (*Williams, supra*, 25 Cal.4th at p. 448.) The court relied on *People v. Collins* (1976) 17 Cal.3d 687 in which a juror's failure to perform her duty, and good cause for discharge was established where " 'the juror steadfastly maintained that she could not follow the court's instructions, that she had been upset throughout the trial and that she wanted to be excused' " (*Williams*, at p. 448, quoting *Collins*, at p. 696.) *Williams* recognized a juror may "properly [be] discharged because she 'was unable to comprehend simple concepts, was unable to remember events during deliberations such as recent discussions or votes, and was not following the law.' " (*Williams*, 25 Cal.4th at pp. 448-449, citing *People v. Williams* (1996) 46 Cal.App.4th 1767, 1780-1781.)

The *Williams* court rejected the defendant's arguments that the juror in question "was exercising his alleged right to engage in juror nullification by refusing to follow the [relevant] law" (*Williams, supra*, 25 Cal.4th at p. 449) and that as a result the court's order denied him his right to jury trial: "The circumstance that, as a practical matter, the jury in a criminal case may have the ability to disregard the court's instructions in the defendant's favor without recourse by the prosecution does not diminish the trial court's authority to discharge a juror who, the court learns, is unable or unwilling to follow the court's instructions." (*Ibid.*) It also rejected the defendant's argument that the juror merely concluded the law should not be applied in his case, pointing out the record, which unambiguously showed the juror refused to hear discussion of the law because he believed it to be wrong, did not support the argument. (*Id.* at p. 461.)

In *Cleveland*, the Supreme Court held the trial court abused its discretion in discharging a juror because the record did not establish as a demonstrable reality that the juror refused to deliberate. (*Cleveland, supra*, 25 Cal.4th p. 485.) There, the jury submitted a note indicating a juror did not agree with the charge and showed an apparent unwillingness to apply the law. (*Id.* at p. 470.) However, the *Cleveland* court held "it became apparent under questioning that the juror simply viewed the evidence differently from the way the rest of the jury viewed it."⁶ (*Id.* at pp. 485-486.) The court explained,

⁶ *Cleveland* recounted the specific complaints of the foreperson, who explained that the juror in question " 'could not even agree that a crime had been committed. It was no fault, no foul, and we are having a hard time attempting to have this person even, quote, unquote, apply the law in the five steps where it is outlined in the document that you gave us to read where it goes to the five points of what is attempted robbery.' The foreperson

"The circumstance that a juror does not deliberate well or relies upon faulty logic or analysis does not constitute a refusal to deliberate and is not a ground for discharge.

Similarly, the circumstance that a juror disagrees with the majority of the jury as to what the evidence shows, or how the law should be applied to the facts, or the manner in which deliberations should be conducted does not constitute a refusal to deliberate and is not a ground for discharge." (*Id.* at p. 485.) The court reasoned it was "possible that [the juror] employed faulty logic and reached an 'incorrect' result, but it cannot properly be said that he refused to deliberate. [The juror] participated in deliberations, attempting to explain, however inarticulately, the basis for his conclusion that the evidence was insufficient . . . and he listened, even if less sympathetically, to the contrary views of his fellow jurors." (*Id.* at p. 486.)

C. Analysis

stated that the juror 'doesn't feel that there is a valid charge. That he cannot in all fairness and conscience state that there was any evidence to support that the defendant allegedly came in and was attempting to get the weapon that allegedly was behind the counter underneath the cash register.' When asked whether the juror in question had made up his mind prior to deliberations and was refusing to discuss the case, the foreperson responded: 'I don't know if I could say that their [*sic*] mind was made up before we went into the room.' The foreperson explained that when other jurors asked this juror to discuss his position, the juror responded: 'You're not going to sway my mind, this is what I feel in conscience in looking at the big picture, no fault no foul, there's pushing and shoving on every football field, and the conversation goes from that point. [¶] Does not want to discuss the five points of the law as to attempted robbery' " (*People v. Cleveland, supra*, 25 Cal.4th at pp. 470-471.) The trial court individually questioned the jurors, who complained the juror was not deliberating, did not want to discuss the elements of the offense in the steps outlined in the instructions, would discuss issues "that had nothing to do with the facts at hand or the case," was "taking [an] unreasonable interpretation," contradicted what other jurors would say, and would not answer their questions. (*Id.* at pp. 470-473.) The trial court discharged the juror on the basis that he was not "functionally deliberating." (*Id.* at p. 473.)

The court here discharged Juror No. 9 based on "the jury's responses," as well as Juror No. 9's "jury note to the Court and her inability to track the Court's questions," ruling "she could not and has not followed the law." The sole issue is whether Juror No. 9's inability or unwillingness to perform a juror's functions appears in the record as a demonstrable reality; that is, whether the court's decision in discharging her is "manifestly supported by evidence on which the court actually relied." (*Barnwell, supra*, 41 Cal.4th at p. 1053.)

Applying these standards, we uphold the court's order. It is clear from the record that the court drew upon its own observations of Juror No. 9 and the notes of the foreperson and Juror No. 11. It credited the foreperson's statements that Juror No. 9 believed CALCRIM No. 1190 to be "invalid" or a "typo" and that she did not believe it. It was entitled to rely on such objective facts. (*People v. Allen and Johnson, supra*, 53 Cal.4th at p. 75 [trial court appropriately relied on other jurors' recitation of what discharged juror said].) It credited Juror No. 9's "unadorned" admission—"I can't follow the law"—on that point. (Accord, *Allen and Johnson*, at p. 73.) Juror No. 9's statements to the contrary did not satisfy the court's overall concern about her willingness to follow the law, and it disregarded those conflicting statements. We accept the trial court's determination regarding Juror No. 9's equivocation as the court did in *Fuiava*, where "[t]he trial court credited [the juror's] confessions that he could not follow the court's instructions because of a personal bias, and we will not, as defendant wishes, revisit that assessment of the weight of the evidence in our evaluation of whether the record supports to a demonstrable reality its decision to discharge the juror." (*Fuiava, supra*, 53 Cal.4th

at p. 714; see also *People v. Diaz* (2002) 95 Cal.App.4th 695, 705 [trial court justified in discharging a juror for having problems deliberating after she gave conflicting stories about why she was distressed and based on court's observation of her demeanor].) The court did not need to accept the foreperson's and other jurors' responses that a particular juror was unwilling to follow the law.⁷ Under *Williams*, a trial court may discharge a juror who is "*unwilling* to follow the court's instructions" and we view the record as establishing to a demonstrable reality Juror No. 9's unwillingness to follow the law. (*Williams, supra*, 25 Cal.4th at p. 449, italics added.)⁸

The record further shows as a demonstrable reality Juror No. 9's *inability* to follow the law based on her remarks ("I don't understand that law") and behavior, which the

⁷ Morales claims that only two jurors expressly addressed the issue of whether Juror No. 9 was willing to follow the law. He attempts to broadly frame the court's inquiry of all jurors as asking whether there was *a* juror who was unwilling to follow the law, not whether Juror No. 9 was willing to follow the law. According to Morales, when the court polled Jurors No. 9 through 12, the phrasing change from whether there was a juror "in the present composition of this jury who is unwilling to follow the law" to "are you willing to follow the law" indicates that Jurors Nos. 10 through 12 were answering the same question as Juror No. 9, namely whether *they* were willing to follow the law. We need not analyze that point because the trial court drew its own conclusion based on Juror No. 9's statement and objective facts from the foreperson and other jurors.

⁸ In *People v. Allen and Johnson, supra*, 53 Cal.4th 60, the California Supreme Court cautioned that trial courts "should be wary of relying on the *opinions* of jurors, rather than on its own consideration of objective facts" and that opinions about a juror's comment should not have played a role in the court's ruling. (*Id.* at p. 75.) But Morales does not contend that the court improperly relied on other juror opinions about Juror No. 9's behavior or mental state. Nor does he contend the court's polling of the jury was an improper effort to delve into their deliberations. (See *People v. Lomax* (2010) 49 Cal.4th 530, 592 [cautioning that trial court's inquiry into juror bias " 'should be as limited in scope as possible' and 'should focus upon the conduct of the jurors, rather than upon the content of the deliberations' "].)

court documented on the record. A juror's " 'behavior and demeanor [may] suppl[y] substantial evidence' of good cause for discharge." (*People v. Zamudio* (2008) 43 Cal.4th 327, 349; *People v. Clark* (2011) 52 Cal.4th 856, 971.) And "[t]he trial court [is] in the best position to assess the juror's state of mind, . . . her demeanor, her vocal inflection and other nonverbal cues." (*People v. Wilson* (2008) 44 Cal.4th 758, 780; accord, *People v. Diaz*, *supra*, 95 Cal.App.4th at p. 705.) We cannot second-guess the court's finding—properly based on its firsthand observations—that "something cognitively was going on with Juror No. 9 that seemed really out of sorts," that "something was amiss," and she did not understand its questions. The court was in the "best position to assess [Juror No. 9's] state of mind, based on her conflicting responses, her demeanor, her vocal inflection and other nonverbal cues" and mental state. (*Wilson*, at p. 780; *People v. Powell*, *supra*, 6 Cal.5th at p. 156 ["emotionally fragile" juror was properly discharged in light of principle that reviewing court's defer to trial court's assessments of a juror's mental and physical condition]; see *People v. Montes* (2014) 58 Cal.4th 809, 874 [grounds for a juror's dismissal existed in the record as a demonstrable reality because the juror's "anguished mental state prevented her from being able to impose a sentence of death"]; *Williams*, *supra*, 25 Cal.4th at pp. 448-449, citing *People v. Williams*, *supra*, 46 Cal.App.4th at pp. 1780-1781.)

Seeking to distinguish his case from *Williams*, *supra*, 25 Cal.4th 441, Morales argues that despite Juror No. 9's note concerning CALCRIM No. 301 and her request to be excused, she thereafter told the court upon further questioning "at least six times that she could follow the law," confirming her willingness to do so. It is true that the juror in

Williams unequivocally stated his objection to the relevant law and unwillingness to follow the court's instructions, and *Williams* makes clear that a juror's discharge is proper under these circumstances. But *Williams* does not address a circumstance where, as here, a sitting juror makes *equivocal* or *inconsistent* statements concerning these obligations, or where a juror's oral assurances are contradicted by other indications of her behavior. *Williams* does not preclude us from holding that Juror No. 9's similar statements (e.g., "I can't follow the law") are a proper basis for dismissal in light of the principle that "when there is conflicting evidence . . . an appellate court must recognize that it is for the trial court to 'weigh the credibility of those testifying and draw upon its own observations of the jurors throughout the proceedings,' and the reviewing court must 'defer to factual determinations based on these assessments.'" (*Fuiava, supra*, 53 Cal.4th at p. 714; see, e.g., *People v. Boyette* (2002) 29 Cal.4th 381, 414 [recognizing that when prospective jurors give conflicting or confusing answers to the trial court, the trial court must weigh that juror's responses in deciding whether to remove the juror for cause].) The court was entitled to discount Juror No. 9's oral assertions when they conflicted with other statements and aspects of her demeanor and behavior, which as stated above, indicated she could *not* understand and follow the law. (See *People v. Diaz, supra*, 95 Cal.App.4th at p. 704; *People v. Lucas* (1994) 12 Cal.4th 415, 489 [juror stated the cancellation of her vacation would not affect the discharge of her duties as a juror but "her behavior and demeanor supplied substantial evidence to the contrary"].)

By isolating portions of the colloquy favorable to him, Morales essentially argues that the court should have believed Juror No. 9 in the instances where she said she could

follow the law and should have discredited her contrary statements. (See *Fuiava, supra*, 53 Cal.4th at pp. 713-714.) This contention runs afoul of the standard by which we are bound because it is a challenge to the weight of the evidence—that the trial court gave undue weight to Juror No. 9's statements that she could not follow the law. (*Id.* at p. 714.) We do not revisit or reweigh the court's credibility assessments of Juror No. 9 because such assessments are "based, as they are, on firsthand observations unavailable to us on appeal." (*Barnwell, supra*, 41 Cal.4th at p. 1053.)

Morales argues the record shows Juror No. 9 was discharging her duty; he points out she participated in deliberations resulting in a jury verdict, and when deliberations resumed she asked for read-backs of testimony as well as further clarifications on instructions. The argument ignores ample evidence from which the trial court could draw a different conclusion, including the foreperson's note stating Juror No. 9 refused to participate in further deliberations until CALCRIM No. 1190 was proven not to be a typographical error. The court reasonably concluded on this record Juror No. 9 could not understand or was unwilling to accept the law and follow it because she believed it ought to somehow be different.

Morales argues that merely pausing before answering the court's questions is insufficient to show Juror No. 9's inability to follow the law, particularly where she eventually directly responded. He suggests the court relied solely on these pauses for its finding that Juror No. 9 did not understand the court's questions and something "cognitively was going on" The record contradicts this contention. Several juror notes contained observations about Juror No. 9's conduct and called into question Juror

No. 9's ability to comprehend the instructions (she "[did not] seem to understand basic concepts," "she reversed herself over and over," and that she "read each jury instruction a dozen times [and] it is as if she's hearing it again for the first time each time one of us says anything about it"). The court was entitled to rely on these objective facts. Juror No. 9 herself stated she should be excused because she did not understand the law. We defer to the court's assessment of Juror No. 9's mental state.

We are unpersuaded by Morales's attempt to compare his case to *Cleveland*, in which the juror "simply viewed the evidence differently from the way the rest of the jury viewed it." (*Cleveland, supra*, 25 Cal.4th at p. 486.) He argues the jury notes and record as a whole demonstrate only Juror No. 9's disagreement with her fellow jurors as to the sufficiency of the evidence as it applied to the law, not that the juror was unable or unwilling to follow the law. Morales claims this is demonstrated by the notes indicating Juror No. 9 did not believe "a conviction can be based on testimony alone," as well as the foreperson's note asking the court on Juror No. 9's behalf to explain CALCRIM No. 220 in relation to CALCRIM No. 1191B, and remark about going "back and forth" about an issue of the law versus reasonable doubt. He points to Juror No. 9's statement that she "could follow the law if there was enough evidence"

The isolated portions of the record to which Morales refers are contradicted by unambiguous statements from Juror No. 9 herself or objective observations from other jurors that Juror No. 9 either disagreed with and would not follow, or did not understand, the law she was to apply to the case. Unlike *Cleveland*, the record does not establish Juror No. 9 was harboring doubts about the merits of the People's case or that she "simply

viewed the evidence differently from the way the rest of jury viewed it." (*Cleveland, supra*, 25 Cal.4th at p. 470.) Nor did the jurors' complaints demonstrate Juror No. 9 "disagree[d] with the majority as to what the evidence shows, or how the law should be applied to the facts, or the manner in which deliberations should be conducted" (*Id.* at p. 485.) Were we to hold Juror No. 9's isolated statement that she "could follow the law if there was enough evidence" makes this case like *Cleveland*, we would have to ignore the trial court's decision to discredit that statement in favor of Juror No. 9's other unambiguous statements that she did not understand, and could not follow, the law.

Cognizant of our standard of review, we are "confident that the trial court's conclusion is manifestly supported by evidence on which the court actually relied." (*Barnwell, supra*, 41 Cal.4th at p. 1053.) Accordingly, the court did not prejudicially err by discharging Juror No. 9. The record establishes as a demonstrable reality that Juror No. 9 was unable to perform her duty as a juror, and there was good cause to discharge her.

DISPOSITION

The judgment is affirmed.

O'ROURKE, J.

WE CONCUR:

HUFFMAN, Acting P. J.

AARON, J.